

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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IN RE ENDANGERED SPECIES ACT  
SECTION 4 DEADLINE LITIGATION

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Misc. Action No. 10-377 (EGS)  
MDL Docket No. 2165

This Document Relates To:  
*WildEarth Guardians v. Salazar*,  
Nos. 10-cv-0048; 10-cv-0421;  
10-cv-1043; 10-cv-1045; 10-cv-1048;  
10-cv-1049; 10-cv-1050; 10-cv-1051;  
10-cv-1068; 10-cv-2299; 10-cv-2595;  
and 10-cv-3366.

**DEFENDANTS' UNOPPOSED MOTION TO EXTEND FINAL LISTING  
DETERMINATION DEADLINE FOR THE GUNNISON SAGE-GROUSE  
UNDER GUARDIANS AGREEMENT  
(EXPEDITED REVIEW SOUGHT)**

Defendants S. M. R. Jewell, in her official capacity as Secretary of the United States Department of the Interior (“Interior”); and the United States Fish and Wildlife Service (“Service”) (collectively, “Defendants”) respectfully move the Court to extend the deadline for the Service to submit to the Federal Register a final listing determination for the Gunnison sage-grouse (*Centrocercus minimus*), which is currently due on May 12, 2014, by six months, until November 12, 2014. As discussed *infra*, a six-month extension is necessary to allow the Service time to complete a final listing determination for the Gunnison sage-grouse, and if listed, a final critical habitat designation, and if listed as threatened, a final special rule, if any. Counsel for Plaintiff WildEarth Guardians (“Guardians”), Sarah McMillan, has indicated that Guardians does not oppose the requested extension. Accordingly, Defendants submit as follows:

1. On September 9, 2011, this Court approved two separate but related stipulated settlement agreements: (1) a stipulated settlement agreement between Defendants and Guardians,

filed on May 10, 2011, Docket (“Dkt.”) No. 31-1 (“Guardians Agreement”); and (2) a stipulated settlement agreement between Defendants and Plaintiff Center for Biological Diversity, filed on July 12, 2011, Dkt. No. 42-1 (“Center Agreement”).

2. Pursuant to Paragraph 1 of the Guardians Agreement, the Service committed to complete several actions as part of the Service’s work-plan for fiscal years (“FY”) 2011 and 2012, including the submission to the Federal Register of a not-warranted finding or a combined proposed listing determination and proposed critical habitat designation for the Gunnison sage-grouse no later than the end of FY 2012 (*i.e.*, September 30, 2012). *See* Dkt. No. 31-1 ¶ 1 and Ex. B at 4. In addition, for each proposed determination submitted to the Federal Register in accordance with paragraphs 1 through 4 of the Guardians Agreement, the Service committed to make a final listing determination in accordance with the statutory deadlines provided in 16 U.S.C. § 1533(b)(6)(A)-(B). Dkt. No. 31-1 ¶ 7. Those statutory deadlines include the Service’s authority to trigger a six-month extension if the Service finds “that there is [a] substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the [final] listing determination [for the species].” 16 U.S.C. § 1533(b)(6)(B)(i).

3. On August 13, 2012, Defendants requested a three-month extension, until December 30, 2012, of the deadline for the Service’s submission of a not-warranted finding or a combined proposed listing determination and proposed critical habitat designation for the Gunnison sage-grouse, citing the Service’s then-ongoing efforts to engage with state and local governments, landowner groups, and other development-related entities to discuss the conservation needs of the species. Dkt. No. 67. Guardians did not oppose the requested extension. Defendants submitted a proposed order that would grant the extension, but also maintain the original deadline for a final listing determination. Defendants’ motion included a

reference to 16 U.S.C. § 1533(b)(6)(A)-(B), but the proposed order inadvertently failed to include specific language to explicitly reserve the Service's statutory authority under those provisions, instead setting September 30, 2013, as the deadline for a final listing determination.

4. On August 17, 2012, the Court entered an order granting Defendants' motion. Dkt. No. 68. In relevant part, the Court ordered the Service to submit to the Federal Register a not-warranted finding or a combined proposed listing determination and proposed critical habitat designation for the Gunnison sage-grouse on or before December 30, 2012; and also amended Exhibit B of the Guardians Agreement to delete the prior deadline regarding the Gunnison sage-grouse. *See* Dkt. No. 31-1, Ex. B at 4. Consistent with Defendants' proposed order, this order also required the Service to complete a final listing determination on or before September 30, 2013.

5. On December 20, 2012, Defendants requested an eight-day extension, until January 7, 2013, of the deadline for the Service's submission of a proposed critical habitat designation for the Gunnison sage-grouse, due, in part, to the time needed for the Service to complete its policy-level review and clearance for its proposed critical habitat designation. Dkt. No. 75. Defendants also informed the Court that the Service still expected to complete and submit to the Federal Register (1) a proposed listing determination for the species on or before December 30, 2012; and (2) a final listing determination for the species no later than the end of FY 2013 (*i.e.*, September 30, 2013). Guardians did not oppose the requested extension. That same day, the Court entered a minute order granting Defendants' motion.

6. The Service completed its combined proposed listing determination and proposed critical habitat designation for the Gunnison sage-grouse on December 28, 2012 – 10 days earlier than initially expected. Dkt. No. 77. Defendants notified the Court of the Service's completion

of its combined proposed listing determination and proposed critical habitat designation for the species by filing a notice on January 2, 2013. *Id.*

7. On June 20, 2013, Defendants moved to amend the Court's prior order, dated August 17, 2012, Dkt. No. 68, to expressly clarify that the Service retained its statutory authority to extend the deadline for a final listing determination by six months in the event of a "substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the [final] listing determination." 16 U.S.C. § 1533(b)(6)(B)(i). The Service also informed the Court that the agency had received several comments from Colorado Parks and Wildlife; Gunnison County, Colorado; peer reviewers; and other entities that raised substantive scientific issues with respect to the Service's interpretation of the available data and conclusions drawn in the proposed listing determination, and thus the Service was considering extending the statutory 12-month period for the completion of such determinations for purposes of soliciting additional data, in accordance with 16 U.S.C. § 1533(b)(6)(B)(i). On June 21, 2013, the Court entered a minute order granting Defendants' motion.

8. On July 19, 2013, the Service announced that, in accordance with 16 U.S.C. § 1533(b)(6)(B)(i), the agency was exercising its authority to extend the deadline for a final listing determination by six months, until March 31, 2014, due to scientific disagreement and also reopening the public comment period to seek additional information to clarify the issues in question. *See* 78 Fed. Reg. 43,123 (July 21, 2013).

9. On September 30, 2013, the appropriations act that had been funding the Service and Interior expired, and appropriations to these and other federal agencies lapsed. On October 17, 2013, the President of the United States signed legislation restoring appropriations to Interior, the Service, and other agencies. However, as a result of this lapse of appropriations, the Service

was required to postpone two public hearings and public informational sessions, which had been previously scheduled for October 7-8, 2013. *See* 78 Fed. Reg. 65,936 (Nov. 4, 2013). On November 4, 2013, the Service announced the rescheduling of these two public hearings and public informational sessions, and the addition of a third public hearing and public informational session, to be held on November 19-21, 2013. *Id.* The Service also announced that it was reopening the comment period on the Service's proposed listing determination and proposed critical habitat designation. *Id.*

10. On January 22, 2014, Defendants requested a six-week extension, until May 12, 2014, of the deadline for the Service to submit to the Federal Register a final listing determination for the Gunnison sage-grouse due to the lapse of appropriations and the additional time necessary for the Service to complete its evaluation of comments submitted in connection with the postponed public hearings and public informational sessions and the reopened comment period. Dkt. No. 84. Guardians did not oppose the requested extension. On January 28, 2014, the Court entered a minute order granting Defendants' motion.

11. Since that time, Defendants have continued to diligently work on a final listing determination for the Gunnison sage-grouse. However, additional time for the final listing determination is necessary for the following reasons. In the proposed rule, the Service proposed to list the species as endangered. Based on new information received during the public comment period and the peer-review process, the Service may conclude that the Gunnison sage-grouse is not presently in danger of extinction throughout all or a significant portion of its range (endangered), but that it is likely to become endangered throughout all or a significant portion of its range in the foreseeable future (threatened). In that event, based on the information currently available, the Service may conclude that it is necessary and advisable for the conservation of the

species to propose a special rule under section 4(d) of the Endangered Species Act. These special rules, referred to as “4(d) rules,” are only applicable to threatened species. The Service believes that, if it determines to list the species as threatened, the concurrent issuance of a final 4(d) rule could be paramount in order to provide measures that are specifically tailored to the conservation needs of the Gunnison sage-grouse and to avoid unnecessary public confusion as to expectations of what type of actions may be prohibited upon listing. At present, the Service estimates that it will take an additional six months to complete a final listing determination for the Gunnison sage-grouse, and if listed, a final critical habitat designation, and if listed as threatened, a final special rule, if any. In addition, the Service has continued its work on a final critical habitat designation for the Gunnison sage-grouse – a designation that was initially proposed by the Service on December 28, 2012, Dkt. No. 77, and on which the Service has worked continuously since.

12. In light of these developments, Defendants believe that a six-month extension, until November 12, 2014, of the deadline for the Service to submit to the Federal Register a final listing determination for the Gunnison sage-grouse is necessary to allow the Service sufficient time to complete a final listing determination for the Gunnison sage-grouse, and if listed, a final critical habitat designation, and if listed as threatened, a final special rule, if any.

13. No other deadlines in the Guardians Agreement, or the Center Agreement, would be affected by Defendants’ requested extension.

14. Defendants have sought one prior extension from the Court regarding the deadline for the Service’s submission of a final listing determination. In addition, Defendants have sought one prior amendment to clarify the Service’s statutory authority to extend the timeline for a final listing determination for the Gunnison sage-grouse, as discussed *supra*.

15. Defendants do not intend to seek any further extensions regarding the Service's rulemaking for the Gunnison sage-grouse. Defendants further expect that they would only seek a further extension upon the occurrence of unanticipated circumstances beyond Defendants' control.

NOW, THEREFORE, Defendants respectfully request that the Court enter an order as follows:

1. The Service shall, on or before November 12, 2014, concurrently submit to the Federal Register a final listing determination for the Gunnison sage-grouse, and if listed, a final critical habitat designation, and if listed as threatened, a final special rule, if any.

Dated: May 5, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 5, 2014, I electronically filed the foregoing Defendants' Unopposed Motion to Extend Final Listing Determination Deadline for the Gunnison Sage-Grouse Under Guardians Agreement and [Proposed] Order with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ H. Hubert Yang

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